No statute runs against a married woman upon an action for damages to person caused by the negligence or wrongful act of a defendant, but she may sue, either at any time during the marriage (her husband joining with her) or within the statutory period after the termination of the marriage. It is rather remarkable that this point should have been decided only after the legislature has declared that the husband is no longer a necessary party in such actions.[2]

What happens to the ancient judicial myth that the right of the wife to sue for personal injuries is community property, in view of the recent amendment allowing the wife to sue alone for such injuries?[3] If she may sue alone, she certainly can control and manage this portion of the community property, notwithstanding that the husband has, in general, such management or control. Some ingenious person will doubtless suggest to the Court that the husband has a vested right in his wife's injuries, and that it was not competent for the legislature to take this right away. If the doctrine that an action for personal injuries to the wife was community property, ever had a shred of common sense to support it, we do not see how the ingenious person's argument would be met,—at least as to injuries incurred before the recent amendment.[4] But, in truth, the doctrine is absurd, and, aside from some judicial dicta, can find no support.[5] A person has no more property in a right to recover for a lost arm or leg, than he had in the arm or leg itself.[6] Juristic thought must somewhere draw a line between persons and property. The damages, when recovered, are, no doubt, property, but prior to judgment, it would seem plain that the right of the wife is purely personal.

O. K. M.

Torts: Slander of Title.—To support an action of slander of title, it is necessary for the plaintiff to prove: (1) that the statements complained of were untrue; (2) that they were made with malice,—that is, without just cause or excuse; and (3) that the plaintiff has suffered special damage.[1] "Notwithstanding the current name, an action for this cause is not like an action for ordinary defamation; it is an action on the case for special damage sustained by reason of the speaking

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[2] Statutes, 1913 p. 217, amending Code Civil Procedure, sec. 370.

[3] In one case the Court sustains without adverse comment, the joinder of the husband's administrator in an action brought for the wife's personal injuries. Counsel contended that this joinder was error, because the wife was not even a proper party to an action brought on account of injuries sustained by herself! Gomez v. Scanlan, (1909) 155 Cal. 528, 530, 102 Pac. 12. The leading authority to the effect that the right to recover such damages is community property is McFadden v. Santa Ana Railway Co., (1891) 87 Cal. 464, 25 Pac. 681.

[4] Spreckels v. Spreckels, (1897) 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. R. 170.

[5] 1 California Law Review, 296.

[6] 1 Law Quarterly Review, p. 281, citing Ulpian to the effect that no one is owner of his own limbs. "Dominus membrorum suorum nemo videtur."

[1] Clerk and Lindsell on Torts, (6th ed.) p. 682.

or publication of the slander of plaintiff's title."[2] The earlier California cases[3] seem to incline to the view that express malice is a necessary ingredient of this form of action. There are courts that sustain this view but the better opinion is that the malice required need not be express, in the sense that the defendant was actuated by malicious motives or ill will. It is sufficient if the disparagement of title is made without just cause or excuse.[4]

In a recent case,[5] a debtor executed and delivered to his creditor bank a deed of the plaintiff's property. The bank recorded the deed in good faith. The bank, its manager, an alleged trustee of the property, and the debtor were joined as defendants. The action was sustained against the debtor only, the plaintiff not being able to prove malice against his co-defendants. The opinion is not altogether clear upon the nature of malice required to support the action. It is said in one part that the plaintiff must show "not only that the statements complained of were false, but that they were maliciously made with intent to defame and disparage;" another part suggests that implied malice is sufficient. It is submitted that the latter view is the more acceptable. The case is of interest in this jurisdiction as justifying an observation[6] of Sir Frederick Pollock that the action is not of frequent occurence.

Similar actions have been before the California courts upon six different occasions, in five of which the plaintiffs failed. In the earliest case,[7] the plaintiff failed to prove malice and a judgment in his favor was reversed, because of an erroneous instruction in regard to malice. If plaintiff fails to show title or an interest in the property, alleged to have been damaged by the slander, his action necessarily fails.[8] Burkett v. Griffith[9] is the leading case in California upon this form of action. In this case, a prospective vendee repudiated his acceptance of an offer to purchase property from the plaintiff, owing to slanderous statements respecting it which were made by the defendant. The court denied recovery, special damage not having appeared. Furthermore, California allows no recovery against one who, from malicious motives, induces another to violate his contract with the plaintiff.[10] Exclusive of the principal case, there is only one California decision[11]

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[2] Tindal, C. J., in Malachy v. Soper, (1836) 3 Bing. (N. C.) 370, 132 Eng. Rep. (Full Reprint) 453.

[3] McDaniel v. Baca, (1852) 2 Cal. 326; Burkett v. Griffith, 1891) 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707.

[4] Hopkins v. Drowne, 1898) 21 R. I. 20, 41 Atl. 567; Manitoba Free Press Company v. Nagy, (1907) 39 Can. Sup. Ct. 340.

[5] Fearon v. Fodera et al., (Oct. 22, 1913) 17 Cal. App. Dec. 427.

[6] Pollock on Torts (8th ed.) p. 308.

[7] McDaniel v. Baca, supra.

[8] Edwards v. Burris, (1882) 60 Cal. 157; Thompson v. White, (1886) 70 Cal. 135, 11 Pac. 564; Hellings v. Duvall, (1901) 131 Cal. 618, 63 Pac. 1017.

[9] (1891) 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707.

[10] Boyson v. Thorn, (1893) 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

[11] Wright v. Coules, (1906) 4 Cal. App 343, 87 Pac. 809.

in which the plaintiff recovered, and that was in an action for special damages sustained by publication of libel affecting plaintiff's business.

D. A. M.

Wills: Condition Determined by Future Event or Act: Doctrine of Incorporation by Reference.—In view of the nature of the condition attached to the devise, there will doubtless be little cause for regret that the court in the matter of the Estate of Budd[1] held the condition void and decreed that the devisee should take the property free from any restriction. A stipulation that a youth, when he arrives at the age of twenty-one, shall declare his intention to carry out the objects and purposes of a "Christ Doctrine Revealed and Astronomical Science Association" is not likely to meet with general approval. The legal ground on which the Supreme Court of California rested its decision, however, may be the occasion for some difference of opinion. The testatrix in her will left property to the devisee on condition that upon attaining the age of twenty-one he should in writing declare that he would carry out the objects and purposes indicated in the articles of incorporation of the above named association. As a matter of fact, the association was not in existence at the date of the making of the will, but was incorporated several days subsequently, by the testatrix and others. Counsel for all the parties interested in the will based their various contentions, opposite in ultimate result, upon the premise that this condition was void, since dependent on the articles of a corporation not in existence at the date of the will. In this view both the trial judge and department two of the Supreme Court acquiesced.

Had counsel differed in their contentions and the question been strongly pressed, it may well be a matter of conjecture whether the court would not have held otherwise. As gathered from the brief reference in the opinion and from the argument made in counsel's briefs, the holding is apparently based on what is known as the doctrine of incorporation by reference. It is a recognized rule that when a separate document is referred to in a will, if it is to be incorporated therein and given testamentary effect, it must have been in existence when the will was made.[2] But do the facts in question present a case calling for the application of this rule? To give effect to the condition, was it necessary that the articles of the association be incorporated into the will and given testamentary effect? Was not the condition sufficiently indicated in the will itself, but with its exact terms, merely, left to be determined by a future event not testamentary in character?

In Yates v. University College, London,[3] a case decided by the House of Lords, a legacy had been left on a condition almost identical in character with the condition in the present case. The testator

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[1] (Oct. 6, 1913) 46 Cal. Dec. 342, 135 Pac. 1131.

[2] Jarman on Wills, 6 Am. Ed. p. 132.

[3] (1875) L. R. VII H. L. C. 438; (1873) L. R. 8 Ch. App. 454.